A

GLAMOUR GREEN SDN BHD

v.

AMBANK BHD & ORS

B

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL WAHAB PATAIL J
[SUIT NO: D4-22-1805-2004]
10 MAY 2006

C ***CIVIL PROCEDURE:*** *Injunction - Interim injunction to restrain bank from selling shares pledged to secure loan - Whether sale authorised - Whether third party undertaking to purchase shares effective immediately upon drawdown - Whether undertaking was effective only upon default - Whether parties bound by contract made*
D *- Whether defence of mistake inapplicable*

BANKING: *Securities for advances - Sale of shares pledged as security for loan - Whether bank authorised to make sale despite no default in loan facility - Whether bank entitled to give effect to third*
E *party undertaking to purchase shares - Whether duty of bank to inform chargor of sale - Whether chargor prevented from redeeming shares*

CONTRACT: *Shares, sale of - Sale of shares pledged as security for loan - Whether sale authorised despite no default in loan facility -*
F *Whether third party undertaking to purchase shares effective immediately upon drawdown - Whether parties bound by bargain made - Whether defence of mistake inapplicable*

On 6 August 2004, the plaintiff, Glamour Green Sdn Bhd,
G entered into two agreements with two companies respectively to purchase a total of 36,524,000 shares in Ladang Perbadanan Fima Berhad. The said shares were purchased for RM138,791,200 at RM3.80 per share. The plaintiff required a sum of RM99,412,080 to complete the said purchase. The
H balance sum of RM39,379,120 was held by Mayban Securities Sdn Bhd ('Mayban'). To secure a loan of RM99,500,000, the plaintiff pledged 35 million of the said shares with the 1st defendant, AmBank. The loan was a short-term loan facility for a period of one month. A purchase undertaking was given by
I the 2nd defendant, Kuala Lumpur Kepong Berhad, in a letter dated 30 November 2004 to purchase 35,000,000 of the pledged shares at RM2.85 per share. As part of the security,

the 1st defendant was given a power of attorney to dispose of the 35 million shares at RM2.85 per share. Subsequently, Mayban notified the 1st defendant that the sum of RM99,500,000 was to be paid into its bank account and the plaintiff agreed to the facility being drawn. Once this was done, the 1st defendant proceeded to effect the purchase undertaking given by the 2nd defendant and did not deem it necessary to inform the plaintiff. On 14 December 2004, the plaintiff informed the 1st defendant that arrangements had been made to fully settle the loan and that the 1st defendant was to await its instructions. However, it was informed that the 35 million shares had already been sold ('the sale') to the nominee of the 2nd defendant, Ablington Holdings Sdn Bhd (the 3rd defendant) as per the purchase undertaking given. Also, that transfer of the 35 million shares was being effected to the 3rd defendant. The plaintiff then obtained an *ex parte* injunction to restrain the defendants from effecting the said transfer. This was the *inter partes* application for the injunction. It was conceded that the plaintiff did not commit any default under the loan facility. Also, the loan tenure period of 30 days from drawdown had not expired. The plaintiff maintained that the sale was only to be exercised in the event of default in the loan facility. Further, the plaintiff argued that the whole transaction did not make commercial sense as the plaintiff suffered loss as a result thereof. Even though the plaintiff would have about 1,500,000 shares remaining after the sale of the 35 million shares, the additional loss incurred far outweighed the value of the remaining shares. On the other hand, the 1st defendant argued that it was authorised to proceed with the sale by virtue of cl. 11.1 of the loan agreement ('cl. 11.1').

Held (dismissing plaintiff's application):

(1) Clause 11.1 not only authorised the sale but also specifically requested the 1st defendant to enter into a sale arrangement in respect of the 35 million shares. The clause contained no qualification that it was to come into operation in the event of default. The events of default were provided for in cl. 18 of the loan agreement. (paras 28, 29 & 30)

(2) The purpose of a written agreement is to provide certainty to the terms and conditions reached between the parties. A written term should not be interpreted to mean other than that what it states simply because a party disputes its interpretation. A purposive approach is applied only when there is an ambiguity or uncertainty in a written term. Clause 11.1 herein contained no ambiguity or uncertainty. (para 33)

(3) It was not disputed that the plaintiff stood to lose as a result of the application of cl. 11.1. The loss was a result of a bad bargain. However, the mere fact that the application of cl. 11.1 resulted in a loss to the plaintiff was an irrelevant consideration since the plaintiff was bound by the bargain made. The courts' jurisdiction to rectify agreements must be kept within strict bounds. The courts must be careful to avoid unwarranted interference in commercial matters since agreements in commerce were essentially bargains between the parties concerned. (paras 40 & 41)

(4) The resolutions of the board of directors and the members of the plaintiff made no qualification that cl. 11.1 was only to apply in the event of default. Neither did the relevant documents lend support to the argument that the sale was only to occur in the event of default. (paras 43 & 46)

(5) The purchase undertaking was to be completed within 30 days. Given that the short-term facility was for one month only, there would no longer be a purchase undertaking to call upon in the event of default. (para 47)

(6) There was no basis for the argument that the short-term facility must in fact be maintained for one month. The effect of the term "whichever shall be the earlier" in cl. 11.1 was that the tenure of the facility would not necessarily be for one month. It was also limited to the date of receipt of the sale, if the date fell earlier than one month. Further, the fact that the plaintiff paid an up-front interest for one month did not mean that it was entitled to the loan facility for one month. That payment was in compliance with a term of the loan agreement. Also,

cl. 8.2 of the loan agreement provided that interest shall be calculated on the basis of actual days elapsed commencing from the date of draw down until full repayment of the advance. That plainly meant that if the full repayment date was earlier than one month the interest for the remaining period of one month was refundable since interest payable was based on the actual days elapsed. (paras 49, 50, 51, 52, 53, 54, 55 & 56)

(7) A bank has no duty to be concerned whether a customer made a profit or not on a loan extended to the customer. A bank need only satisfy itself that the customer is able to repay the loan facility. A bank is not the judge of any wisdom, prudence or foolishness of the customer's transaction. The 1st defendant's concern for its own protection was justifiable. If the resulting terms were not acceptable to the plaintiff, it was open to the plaintiff not to have executed the loan agreement. The 1st defendant had, in fact, proceeded further and notified the plaintiff of the sale. (para 69)

(8) There was no clog on the equity of redemption. The plaintiff could redeem the pledged shares at any time before the purchase undertaking became effective and unconditional. Clause 11.1 appointed the 1st defendant to a separate and distinct role as agent of the plaintiff. In carrying out the sale, the 1st defendant was acting in the capacity of the plaintiff as the owner of the said shares. Such act was not a clog on the equity of redemption. (para 70 & 71)

(9) The 2nd defendant was not a party to the terms and conditions in the loan agreement and documentation between the 1st defendant and the plaintiff. There was no justification to estop the 2nd and 3rd defendants from receiving the shares that had been paid pursuant to the purchase undertaking. For that reason too, the 1st defendant could not be estopped from delivering the shares to the 2nd and 3rd defendants. (paras 82, 83, 84)

(10) Since the consequences of signing the loan agreement resulted in a loss to the plaintiff, the transaction was obviously a mistake. Section 23 of the Contracts Act 1950 was not applicable since the mistake was unilateral. Even if common law was applicable, there was no evidence put before the court that the 1st defendant was aware that the plaintiff was mistaken. There was also no reason to believe that the plaintiff, a company able to meet its part of the purchase price, would not know what it was doing. It was clear that the operative clause sprang not from a mistake but from the failure to read the agreement before execution. The plaintiff should have sought clarification of the letter informing the plaintiff that the acquisition of the shares was to be completed within 30 days. The plaintiff had, in fact, acknowledged that letter. If clarification had been sought and a mistake had occurred, damage could have been prevented. The certainty of contracts provided by contract law would be defeated if a party could escape from being bound by the terms of a written contract he signed on the grounds that he did not read it. (paras 85, 86, 87, 88, 89)

(11) The plaintiff did not provide any satisfactory explanation as to why it proposed to the 1st defendant that the deficit of RM99,500,000 was to be met by the sale to a third party at RM2.85 per share. That language set the representation that the third party was the "take-out" source for the loan and it was apparent that the 1st defendant proceeded to consider granting the short-term loan on the basis that there was an acceptable third party take-out source. Even if the common law was applicable, notwithstanding s. 23 of the Contracts Act 1950, the circumstances could not justify the court to interfere on the grounds of mistake. (para 91, 92 & 93)

(12) The fiduciary duties, if any, of a bank is limited to the nature of the relationship or transaction between the bank and the customer. There is no general fiduciary duty, such as that of a trustee or of a director of a company, as between a bank and a customer. The relationship is contractual. There was no evidence that the 1st defendant took instructions from the 2nd and 3rd defendants to the detriment of the plaintiff. The 1st

defendant, as agent was not obliged to obtain prior instruction or confirmation from the plaintiff before proceeding with the sale. It had a clear direction to proceed. It would be exposed to liability if it delayed the sale and the market price of the shares fell or if the 2nd defendant became unable to honour its purchase undertaking. (para 94)

(13) The purchase undertaking by the 2nd defendant made possible the grant of the loan facility to the plaintiff. The 1st defendant had given notice to the plaintiff that the sale to the 2nd defendant would be completed within 30 days from the date of the letter of the purchase undertaking. The plaintiff had acknowledged that letter. Upon drawdown of the RM99,500,000, the 1st defendant proceeded, in accordance with cl. 11.1, and declared the purchase undertaking unconditional and effective. Since the 1st defendant was clearly and validly appointed as agent under cl. 11.1, it did not err in proceeding to confirm and make unconditional the purchase undertaking by the 2nd defendant. There was no pre-condition that it must first inform the plaintiff. Its failure to inform the plaintiff was only a failure to exercise an abundance of caution but did not vitiate its action. Upon being notified of its undertaking, the 2nd defendant was obliged to honour it and it did so when full payment was made on 14 December 2004. On that date, the sale was complete and the 2nd and 3rd defendants were entitled to exercise their rights thereunder. In the circumstances, the tenure of the short-term facility ended. (paras 95 & 96)

[Counter-claim by 2nd and 3rd defendants allowed.]

Case(s) referred to:
Sheikh Brothers Ltd v. Ochsner [1957] AC 136 PC ***(refd)***
Thai Chee Ken v. Bangue Paribas [1992] 2 SLR 841 ***(refd)***
Wan Salimah Wan Jaffar v. Mahmood Omar (Amin Abdul Aziz, Intervener [1998] 1 CLJ 480 HC ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 21, 23

Contracts Act [India], s. 20

For the plaintiff - WSW Davidson (Rodney Koh, Hariharan Tara Singh, Wan Shahrizal Wan Ladin & Yvonne Law with him); M/s Wan Shahrizal, Hari & Co

For the 1st defendant - Ahmad Redza Abdullah (Alvin John with him); M/s Lu Kee Chee

For the 2nd & 3rd defendants - Loh Siew Cheang, Ranjit Singh, Vong Poh Fah, Gregory Ling & Kelvin Seet with him); M/s Ranjit Ooi & Robert Low

For the 2nd defendant - Paul Ong (Soo San San with him); M/s Paul Ong & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Abdul Wahab Patail J:

[1] By this action the plaintiff Glamour Green Sdn. Bhd. ("Glamour Green") sought the following reliefs:

(i) An interim injunction by this Honourable Court to restrain the first defendant AmBank Berhad ("AmBank"), the second defendant Kuala Lumpur Kepong Berhad ("KL-Kepong") and the third defendant Ablington Holdings Sdn. Bhd. ("Ablington"), employees, agents or its service providers from carrying out the settlement, registration, payment and/or transfer the disputed sale shares sold into Ablington's name in any way or whatsoever *vide* Bursa Saham Securities Clearing Sdn. Bhd. and Bursa Malaysia Depository Sdn. Bhd;

(ii) An interim injunction by this Honourable Court to restrain Ablington from carrying out the mandatory general offer to buy the remaining public shares in LPF which has yet to be owned;

(iii) A declaration that the sale and purchase of the disputed resale shares owned by Glamour Green in LPF between the AmBank and the Ablington is null and void on the grounds set out in paras 17A to 17D above, (lack of authority to sell and deprivation of the equity of redemption);

(iv) A declaration that the sale and purchase of the disputed resale shares is illegal and null and void on the grounds set out in paras 17I above (illegality);

(v) Consequential orders that:

(a) the Ablington to forthwith return to the AmBank the disputed resale shares;

(b) the period for Glamour Green to redeem the said block shares under the loan agreement be extended for such period as the court deems just and equitable.

(vi) General damages to be paid by AmBank, KL-Kepong and Ablington on the grounds set out in paras 15 and 16 of the claim (fraudulent conspiracy);

(vii) General damages to be paid to Glamour Green by the AmBank on the grounds set out in para 17A (breach of contract), on the grounds set out in paras 17E and 17F (breach of fiduciary duty), on the grounds set out in paras 17G and H (fraudulent misrepresentation);

(viii) Exemplary damages to be paid by AmBank, KL-Kepong and Ablington;

(ix) Interest in the rate and amount this Honourable Court deems fit and proper to grant;

(x) Costs; and

(xi) Any other relief this Honourable Court deems fit and proper to grant

The Background Facts

[2] On 6 August 2004, Glamour Green had entered into two simultaneous agreements to purchase shares in Ladang Perbadanan Fima Berhad (LPF) from (a) Kumpulan Fima Berhad (FIMA) - 26,496,000 shares and (b) from Amalan Kontrak (M) Sdn. Bhd. (Amalan) – 10,028,000 shares at RM3.80 per share totalling RM100,684,800 and RM38,106,400 respectively. Thus a total of 36,524,000 shares were purchased for RM138,791,200. The purchase was due for completion originally on 3 December 2004. This was later extended to 6 December 2004.

[3] A loan of RM99,412,080 was needed to complete the purchase of the shares.

[4] All financing arrangements were left by the shareholders of Glamour Green to Daniel Wong Jit Kiang (PW2), who had a general verbal mandate to facilitate the completion of the purchase of the FIMA and Amalan blocks by the raising of finance, and to deal with banks for that purpose.

[5] Daniel Wong (PW2) sought assistance from KL-Kepong to enable Glamour Green to complete the purchase. He met with Dato' Lee Oi Hian (DW5) of KL-Kepong. Daniel Wong (PW2) had dealt with Dato' Lee Oi Hian (DW5) previously on LPF shares. At a meeting on 22 November 2004 and a later telephone call, Dato' Lee (DW5) agreed to do so by providing an irrevocable undertaking to purchase the LPF shares at RM2.85 per share. Further, Dato' Lee (DW5) made a telephone call to Dato' James Lim Cheng Poh (DW1) of AmBank to introduce Daniel Wong (PW2) to the latter.

[6] The introduction resulted in a meeting between John Lam (DW2) of AmBank and Daniel Wong (PW2) on 26 November 2004, in which Daniel Wong (PW2) sought a short term loan facility from AmBank for a period of one month. On the same day, Daniel Wong (PW2) sent to AmBank a Memorandum setting out the funding required of RM99,412,080 and stating that the balance sum of RM39,379,120 was already held by Mayban Securities Sdn. Bhd. ("Maysec"), the brokers for the transaction. The Memorandum also listed an "irrevocable and unconditional undertaking issued by an acceptable buyer valued within the terms of the facility to purchase the pledged shares at RM2.85 a share", as part of the security offered, which included:

(a) A charge over 35 million LPF shares.

(b) A power of attorney in favour of the financier to dispose 35 million pledged shares at RM2.85 a share.

(c) Placement of fixed deposit of RM100 million by the third party to guarantee its performance under a purchase undertaking.

[7] An Exco meeting of AmBank on 29 November 2004 approved Glamour Green's application for a short term loan facility. Later the same day in a meeting in the bank's offices, attended by Daniel Wong (PW2) and K. Ravindran (PW3) for Glamour Green, and Dato' James Lim (DW1) and John Lam (DW2) for AmBank, Glamour Green was informed of the approval by AmBank.

[8] Drafts of the loan agreement, memorandum of deposit, charge and the purchase undertaking were e-mailed by Ms. Loo May Pearl of solicitors for AmBank, to K. Ravindran (PW3) for Glamour Green on 30 November 2004.

[9] The purchase undertaking by KL-Kepong is contained in a letter, hereinafter referred to as "the KL-Kepong Letter", signed on 30 November 2004. AmBank issued its letter of offer to Glamour Green on the same date.

[10] It is not disputed also that the acceptance of the letter of offer by AmBank, acknowledgement of receipt by Glamour Green of a copy of the purchase undertaking, the loan agreement, memorandum of deposit and charge, various corporate resolutions of Glamour Green, power of attorney and guarantee were signed on 1 December 2004 but were dated 30 November 2004. Drafts had been sent by e-mail by AmBank's solicitors to K. Ravindran (PW3) of solicitors for the plaintiff.

[11] On 2 December 2004 AmBank notified Glamour Green of the charges payable prior to the loan disbursement ie, facility fee of RM995,000, up-front interest of RM677,000, cash deposit of RM597,000, in all RM2,269,000. These payments are exclusive of other charges and fees for the legal documentation. On 3 December 2004, Glamour Green paid all the above sums including RM106,451 for AmBank's lawyer's fees. On 6 December 2004, Maysec notified AmBank that the facility sum of RM99,500,000 was to be paid into their bank account not later than 10.30am on 9 December 2004. However, Glamour Green subsequently agreed to the facility being drawn down one day earlier ie, on 8 December 2004.

[12] On 8 December 2004, AmBank informed KL-Kepong that the sale shares had been credited into the bank's nominees account and that the KL-Kepong Letter was unconditional and effective. At the foot of this letter, there was provision for KL-

Kepong to confirm receipt and also confirm that they would effect completion of the acquisition transaction in accordance with the KL-Kepong Letter. This letter was not copied or notified to Glamour Green. Though advised by their solicitors to do so, Sylvia Saw Lee Kheng (DW3) of AmBank decided it was not necessary to inform Glamour Green.

[13] On 14 December 2004, Glamour Green wrote to AmBank informing them that arrangements had been made to fully settle the short term loan facility and AmBank was to await instructions from Glamour Green. This was prompted by receipt, according to Daniel Wong (PW2), of a telephone call that morning from a bank officer.

[14] On the same day, Ablington paid AmBank the total purchase consideration of RM99,750,000.

[15] On that same day, 14 December 2004, in response to Glamour Green's letter of 14 December 2004 above, the AmBank's solicitors informed Glamour Green by letter that 35 million of the LPF shares had been sold on 30 November 2004, and they are proceeding to effect transfer to Ablington.

[16] On that same day also, 14 December 2004, Ablington moved to give notice of a conditional mandatory general offer and to announce their acquisition of an additional 30.6% of the equity of LPF bringing their holdings together with shares already held up to 46%. Glamour Green proceeded to seek the *ex parte* injunction in these proceedings, which was granted on 16 December 2004. It was conceded that Glamour Green had not committed any event of default under the loan agreement and no notice of any default had been given to Glamour Green and the loan tenure period of 30 days from drawdown not expired.

The Case For The Plaintiff

[17] At the onset of these proceedings, the plaintiff procured an *ex parte* injunction on the grounds of fraud and conspiracy and illegality perpetrated by the first defendant bank in collusion with the second and third defendants to the detriment of the plaintiff. At that juncture, the main thrust of their claim was fraud and conspiracy. This allegation and the fact that on a *prima facie* basis the plaintiff would suffer a RM40 million loss

by virtue of the sale of the shares at RM2.85, an *ex parte* injunction was granted. Just prior to the application to hear the *inter partes* application, the plaintiff then applied to include various other causes of action such as breach of statutory duty etc. The amendments were allowed. On the first day of trial, the plaintiff again applied to amend their pleadings. The same was also allowed.

[18] During trial, counsel for the plaintiff informed this court the plaintiff would abandon all causes of action in respect of conspiracy, fraud, misrepresentation and illegality. The main thrust of their claim at trial are confined to implied terms derived from an alleged factual matrix.

[19] A re-re-amendment was again allowed after the whole trial was concluded and after the first round of submissions was filed in court. At that time, the amendment was to include a fresh cause of action for mistake.

[20] In submissions for Glamour Green, the grounds addressed are as follows:

(i) As a matter of construction of the loan documentation, the purchase undertaking is part of the security for its facility from the AmBank exercisable in an event of default and not the preferred means of payment or "take-out source" as the AmBank terms it, either:

(a) By taking a purposive interpretation against the factual matrix of the case; or

(b) As an implied term;

And if so, the AmBank is in breach of the loan agreement and Glamour Green is entitled to the injunctions and damages as prayed for.

(ii) In the alternative, if the purchase undertaking was to be the means of repayment of the loan as contended by the defendants, it would constitute a clog on the equity of redemption and would render the loan transaction void.

(iii) In the further alternative, as Glamour Green and the Ablington always intended and were under a common assumption that the Ablington or its nominee the KL-Kepong were to be merely a stand-by buyer in the transaction, the second and third defendants are estopped from contending that the purchase undertaking was anything other than security exercisable only in the event of Glamour Green's default

(iv) In the further alternative, Glamour Green had entered into the loan agreement with the AmBank under a fundamental mistake of fact in relation to the loan transaction. As such, pursuant to s. 21 of the Contracts Act 1950 the loan transaction is void. (Ground No. 4 is subject to Glamour Green's application to amend the amended statement of claim to be heard on 22 September 2005.)

(v) In the further alternative:

(a) The AmBank, acting as agent in the sale of the LPF shares, had breached its fiduciary obligations to Glamour Green in selling the LPF shares on 30 November 2004 by way of the purchase undertaking and in the manner they had conducted themselves leading up to and subsequent to the said sale, including putting themselves into a conflict of interest situation by taking instructions from the Ablington to the detriment of Glamour Green and/or by failing to inquire in circumstances that ought to have put them on inquiry; and

(b) KL-Kepong and Ablington were in knowing receipt of a substantial financial benefit directly resulting from the breach of the AmBank's fiduciary obligation to Glamour Green as above said.

The Central Issue

[21] Counsel for Glamour Green introduced the issue in his submissions as follows:

> The central issue in this case was whether the arrangements between the Plaintiff and the First Defendant constituted not merely a secured loan for the purpose of completing the purchase of the FIMA and Amalan shares, but also to borrow the words of Sylvia Saw (WS-DW3, Q25), that there was a

done deal, whereby not only was the Third Defendant bound by the PU but the First Defendant was not only entitled but legally bound to effect an immediate resale, such that the Plaintiff was totally deprived of the equity of redemption.

[22] He explained this central issue raised several sub-issues as follows:

(a) What is the meaning of the term security;

(b) Was the PU intended to be part of the security arrangements for the loan, or simply a take out source;

(c) What is the meaning of 'purchase undertaking' as mentioned in the loan documents;

(d) Was the purchase undertaking intended as a unilateral undertaking by the third defendant to be called on by the first defendant and if the latter, only in the event of a default; and

(e) Is the agency authority apparently conferred on the first defendant by the plaintiff under cl. 11 of the loan agreement (B2.Tab 29) separate and independent from the security arrangements in cl. 14 of the same documents?

Findings

[23] Since the sub-issues are essentially aspects of the same issue re-stated from different perspectives, it is not absolutely essential to proceed in that order for the purpose of dealing with the central issue.

[24] From the outset, it is borne in mind that there has been no event of default at any time under the short term loan facility as would warrant a disposal of the pledged LPF shares under the terms of the facility. The basis then of the case for Glamour Green is founded upon there being a short term loan facility under which there has been no event of default, where:

(a) it had applied for a short term loan facility;

(b) it was granted a short term loan facility for one month;

(c) it had paid the interest up-front for the short term loan facility; and

(d) the KL-Kepong Letter was part of the security for the short term loan facility.

[25] The AmBank version does not dispute these assertions of fact, but adds that the transaction was not only a short term loan facility but that AmBank was also appointed under cl. 11.1 as agent and as such agent was requested and authorised under the loan agreement, and therefore obliged to effect the sale of 35,000,000 LPF shares to KL-Kepong or its nominee. The appointment as agent under cl. 11.1 is not disputed.

[26] The only dispute focuses, therefore, upon the purpose of the appointment under cl. 11.1 of the loan agreement. The various issues derived from the foregoing relating to this dispute are dealt with below.

Appointment Of AmBank To Sell The LPF Shares

[27] The appointment as agent as contained in cl. 11.1 of the loan agreement is as follows:

> **11. Sale of LPF Shares**
>
> 11.1 The Borrower hereby irrevocably and unconditionally authorises and requests the Bank to enter into a sale arrangement to effect the sale of the LPF Sale Shares to the LPF Sale Shares Purchaser for the LPF Sale Shares Consideration as agent of the Borrower. The terms of sale shall be determined by the Bank at its discretion and the Borrower hereby confirms and agrees that the same shall be binding on the Borrower.

[28] In its plain and ordinary meaning cl. 11.1 not only authorised, but it also more specifically, requested AmBank to enter into a sale arrangement to effect the sale of 35,000,000 LPF shares to the "LPF Sale Shares Purchaser".

[29] If cl. 11.1 is strictly a part of the security for the loan as is maintained by Glamour Green, it would come into operation only in the event of a default. I find no support for the view that it is strictly a part of the security in cl. 11 since the clause contains no such qualification.

[30] The events of default are provided for in cl. 18 of the loan agreement. Clause 18 sets out in detail the events of default in cl. 18.1 and then provided in cls. 18.2 and 183:

18.2 Upon the occurrence of an Event of Default and at any time thereafter, the Bank may (whether such Event of Default is continuing or otherwise):

18.2.1 by written notice to the Borrower declare the Indebtedness to be immediately due and payable (whereupon the same shall become so payable together with accrued interest thereon and any other sums then owed by the Borrower hereunder) or declare all or any part of the Advance to be due and payable on demand of the Bank; and/or

18.2.2 by notice to the Borrower declare any undrawn portion of the Facility to be cancelled, whereupon the Facility shall forthwith be cancelled.

18.3 At any time after the moneys hereby secured shall have become immediately repayable under any of the provisions of Clause 18.2 hereof, the Bank shall be entitled to concurrently exercise all remedies of sale or civil suit whether under the Security Documents or by statute provided.

18.4 The certificate of the Bank as to the amounts payable by the Borrower to the Bank shall be final and conclusive and binding on the Borrower and shall, except in the case of manifest error, be deemed to be sufficient proof that the amounts so certified are due and owing by the Borrower to the Bank.

[31] There is no language in cl. 18 that disposal is to proceed under cl. 11.1. Neither is there, as alluded to earlier above, a qualification in cl. 11.1 that it is for the purposes of disposal in an event of default under cl. 18. I find, therefore, there is nothing in the loan agreement to say that cl. 11.1 applies only in the event of default as would be the case if it were strictly security for repayment.

Implied Term

[32] It was submitted for Glamour Green that it is to be implied that cl. 11.1 is strictly part of the security for the loan facility, resulting from a purposive approach to the interpretation. As an example of the approach, counsel for Glamour Green cited *Thai Chee Ken v. Bangue Paribas* [1992] 2 SLR 841:

A (a) by looking at the true and common intention of the parties;

(b) paying due regard to both the substance and the form of the transaction;

B (c) the position of the parties;

(d) the whole of the circumstances leading to and under which the transaction came about.

[33] The purpose of a written agreement is to provide certainty C of the terms and conditions of the agreement reached between the parties. That purpose would be lost if a written term in an agreement is by interpretation read to mean other than what that written term says simply because a party disputes its interpretation. For that reason, a purposive approach is applied D only when there is an ambiguity or uncertainty in a written term. Clause 11.1 contains in itself no ambiguity or uncertainty.

[34] The next question is whether cl. 11.1 read in the context of the loan agreement results in an ambiguity or uncertainty and requires that an implied term is read into an agreement. E

[35] The term "LPF Sale Shares" used in cl. 11.1 of the loan agreement was specifically defined as:

> means all those Thirty Five Million (35,000,000) ordinary F shares of RM1.00 in LPF forming part of the LPF Shares charged to the Bank under the Memorandum of Deposit and Charge over Securities which the Borrower authorises the Bank to enter into a sale arrangement with the LPF Sale Shares Purchaser.

G **[36]** The term in cl. 11.1 "LPF Sale Shares Purchaser" was also defined as:

> means such purchaser of the LPF Sale Shares as may be acceptable to the Bank and includes its successors in title

H **[37]** There is no evidence of any purchaser other than KL-Kepong whose purchase undertaking was accepted by AmBank.

[38] Proceeding further, cls. 19 and 21 provide:

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19. Proceeds Of Sale

19.1 Upon the realisation, sale or disposal of the LPF Shares and any other asset or security given to the Bank under any of the Security Documents, the Bank may apply the proceeds thereof as follows:

...

...

21. Deficiency In Proceeds Of Sale

If the amount realised by the Bank on the sale of the properties and assets secured under the Security Documents after the deduction and payment from the proceeds of such sale of all fees, dues, costs, rates, taxes and other outgoings is less than the amount due to the Bank and whether at such sale the Bank is the purchaser or otherwise the Borrower shall pay to the Bank the difference between the amount due and the amount so realised and until payment shall also pay interest on such balances at the rate specified in Clause 9 hereof before as well as after judgment.

[39] Unlike cl. 11.1, these clauses do not speak of disposal to LPF Sale Shares Purchaser or of LPF Sale Shares. The matters set out in cl. 19 for which the sale proceeds could be applied to, cover the range of costs and expenses where there is event of default. Further the words "and whether at such sale the bank is the purchaser or otherwise" in cl. 21 show that the sale, unlike that in cl. 11.1, is not confined to the "LPF Sale Shares Purchaser". Clause 11, preceding cls. 18, 19 and 21 which dealt with events of default, disposal, proceeds of sale and deficiency in the proceeds of sale, could not result in any deficiency in proceeds if carried out.

[40] There is no ambiguity, uncertainty or even inconsistency in the loan agreement. It is only in the result of the application of cl. 11.1 as a direction and authority to proceed with a sale of the shares to KL-Kepong before any event of default, that Glamour Green stands to lose RM0.95 per share and the costs of the loan. However, it is obvious that the loss is the result of a bad bargain. In plain terms the loan appears to make no sense for Glamour Green, unless there is read into cl. 11.1 an implied term that it applies only in the event of default.

[41] In considering whether such a term is to be implied, it must be acknowledged that such an implied term could more readily be made if there were no specific provision relating to events of default in the loan agreement, since if provision is already made, it must imply that all that was intended by the parties as recourse in the event of default is already provided for in those clauses. Nor is there inconsistency occasioned by reading cl. 11.1 as a clause independent of events of default giving direction and authority to proceed with sale, other than the fact it results in a loss to Glamour Green. The mere fact a clause like cl. 11.1 if read in such manner would result in one party to make a profit or loss is an irrelevant consideration, since a party is bound by the bargain he has made. The courts' jurisdiction to rectify agreements must be kept within strict bounds. The courts must be careful to avoid unwarranted interference in commercial matters since agreements in commerce are essentially bargains between the parties. In this case, Glamour Green was represented by Daniel Wong (PW2) who had dealt in shares and K. Ravindran (PW3), who although he denies being the solicitor on record for the loan, is nevertheless a lawyer and worked with Daniel Wong (PW2) and received the drafts, and although Glamour Green was borrowing RM99,500,000, it in fact was able to put up RM39,379,120. It is not some small company with little business acumen.

[42] Outside of the loan agreement, the circular board resolution, the member's resolution and the certified extracts thereof, all of 30 November 2004 clearly provide:

> (6) That the Bank is hereby authorised to enter into a sale arrangement with such person acceptable to the Bank to sell 35,000,000 ordinary shares in LPF from the LPF Shares charged to the Bank at a price of RM2.85 per share. The terms of the sale shall be determined by the Bank at its discretion and the board shall and shall take all steps and execute all documents necessary to ratify the terms of sale agreed between the Bank and such purchaser.

[43] The resolutions of the board of directors and of the members of Glamour Green themselves make no qualification of the authorisation to apply only in the event of default.

[44] At the same time by a letter dated 30 November 2004 AmBank informed Glamour Green:

Irrevocable Authorisation to the Bank to enter into sale arrangement with a purchaser for the sale of 35.0 Million ordinary shares of RM 1.00 ("LPF Sale Shares") in Ladang Perbadanan-Fima Berhad for the price of RM2.85 per share.

We refer to the above matter.

We hereby write to inform Kuala Lumpur Kepong Berhad ("KLK") has agreed to purchase the LPF Sale Shares at the price of RM2.85 per share with the acquisition to be completed within 30 days from 30 November 2004. We enclose herewith a copy of the Purchase Undertaking dated 30 November 2004 executed by KLK in our favour as agent.

Please acknowledge receipt.

[45] Glamour Green acknowledged receipt of the above letter the same day. Indeed to hold that AmBank would not have proceeded with loan and release the RM99,500,000 without the KLK purchase guarantee and the acknowledgment of the above, would not be without basis. The letter states clearly the sale would be completed within 30 days from 30 November 2004. Daniel Wong (PW2) himself said in his witness statement that the bank would not consider granting the loan even though it is fully secured unless there is a good take out source. I conclude the letter made it very clear the transaction of sale of 35,000,000 shares at RM2.85 per share was not to be proceeded with only in the event of default.

[46] The memorandum of deposit and charge over securities and the power of attorney both of 30 November 2004 are consistent with a normal transaction authorising disposal in the event of a default. These documents make no mention of LPF Sale Shares or LPF Sale Shares Purchaser. These documents, therefore, do not lend support to the argument that the sale to KL-Kepong as a transaction was only to occur in the event of a default.

[47] The interpretation sought on behalf of Glamour Green that cl. 11.1 is strictly applicable only in the event of default cannot be supported since the purchase undertaking in the KL-Kepong Letter was to be completed within 30 days. This was never in dispute. Thus, if the interpretation is given that cl. 11.1 is to apply in the event of default, then given that the

short term facility is for one month, there would no longer be a purchase undertaking to call upon when action is taken upon an event of default.

[48] I find that the documentation executed on 30 November 2004, and those executed 1 December 2004 and dated 30 November 2004 give no grounds to imply that cl. 11.1 is to apply strictly only in the event of default and is not an authority and a request by Glamour Green to AmBank, independent of its powers to dispose of all the pledged shares in the event of default, to effect the sale of the LPF Sale Shares to the LPF Sale Shares Purchaser.

Tenure Of Facility And UP Front Interest

[49] A key aspect of the Glamour Green claim is that the short term facility was for one month and that Glamour Green had paid the interest thereof in advance. Meaning, therefore, that Glamour Green was entitled to have the facility for one month, regardless.

[50] The approval by the Executive Committee of AmBank as to tenure followed recommendations within AmBank as indicated by the internal memorandum dated 29 November 2004 to the Executive Committee, which stated the tenure as:

> 1 month from the date of drawdown. The facility shall be repaid in one lump sum at the end of the tenure or upon sales of pledged shares, whichever is earlier.

[51] The words "whichever is the earlier" in the internal memorandum shows consistency within AmBank as to the tenure, and which is carried forth into the loan agreement with Glamour Green in cl. 1.1 which defined the "Repayment Date" to:

> mean the date falling one (1) month from the full drawdown of the Facility or upon receipt of the LPF Sale Shares Consideration, whichever shall be the earlier.

[52] The effect of the term "whichever shall be the earlier" is not only that the tenure of the facility would not necessarily be one month, but that the tenure is in fact limited to the date the LPF Sale Shares Consideration is received, if that date of receipt is earlier than one month.

[53] The payment of up-front interest of RM667,000 is in compliance with the agreed term in cl. 8.2 of the loan agreement:

> Interest shall be calculated on basis of actual days elapsed commencing from the Drawdown Date until full repayment of the Advance. The Borrower shall pay to the Bank up-front interest computed for a period of One (1) month from the Drawdown Date on the Advance outstanding.

[54] The payment of an agreed up-front interest is in compliance with a term of the agreement. As such, it does not import the inferences that might be drawn when an agreed interest payable under an agreement, is paid in advance and it is accepted. In the former, it relates to the pricing of the facility since interest paid in advance at the beginning of a time period, is in effect more expensive than the same interest paid at the end of the time period. But in the latter case, where payment in advance is not a term of or obligation under an agreement, a payment of interest in advance if accepted by the lender means the lender is committed to giving the borrower the relevant period of the advance. Clause 8.2 above places the payment by Glamour Green in the former and not the latter category.

[55] Furthermore, the words in cl. 8.2 that "Interest shall be calculated on basis of actual days elapsed commencing from the Drawdown Date until full repayment of the Advance" plainly means that if the full repayment date is earlier than one month the interest for the remaining period of the month would be refundable, since interest payable is based on the actual days elapsed. I find it is a short term facility for a maximum of one month or upon receipt of the LPF Purchase Consideration, whichever is the earlier.

[56] There is no basis, therefore, for the argument that the short term facility must in fact be maintained for one month.

Consistency In AmBank As To Repayment Source Of Loan Facility

[57] The memorandum to the Executive Committee also described the repayment or "take-out" source as an unconditional and irrevocable undertaking from Kuala Lumpur Kepong Berhad to purchase the pledged LPF shares at RM2.85

a share. This also shows that within AmBank there is a consistent perception that the LPF shares would be sold within one month and provide the repayment source. The memorandum indicated the proposal was tabled for approval based, *inter alia*, on:

> 1. Strong and confirm (sic) take out source
>
> The STL to part finance the acquisition of LPF shares by the Borrower will be fully settled *via* placement of 35mil. LPF shares to Kuala Lumpur Kepong Berhad ("KLK") at RM2.85 a share, thereby raising RM99.75 mil. KLK will give to AmBank, an irrevocable and unconditional undertaking, valid within the tenure of the facility, to purchase the pledged shares at RM2.85 a share.

[58] The memorandum proposed the following list as security:

(i) A charge over the LPF shares (pledged shares).

(ii) A power of attorney to be executed in favour of AmBank to dispose the pledged shares at RM2.85 per share.

(ii) An irrevocable and unconditional undertaking issued by Kuala Lumpur Kepong Berhad to AmBank to purchase pledged shares at RM2.85 per share.

(iii) Irrevocable instruction from KLK or its subsidiaries to maximum of 35.0 million shares.

(iv) Deed of assignment over the LPF share sale proceeds.

(v) And/or any other forms of documents as advised by the lawyer to best protect and enhance the bank's security position.

[59] These do not bind Glamour Green, but they serve to show that AmBank had consistently been concerned to ensure all areas of its exposure to risk were attended to and the risks to itself as lender were eliminated or at least minimised, and their subsequent actions are consistent with these concerns.

The Transaction Does Not Make Commercial Sense For Glamour Green

[60] The strongest argument marshalled and relied upon by Glamour Green is why would a purchaser want to incur the costs of a short-term borrowing, only to dispose off the shares to another at a further loss when it would lose much less by defaulting on its own purchase. By the terms of the short term loan facility, Glamour Green faced not merely the risk of a loss, but the certainty of it. The transaction of taking a short term facility to purchase shares and immediately disposing of the shares as shown on the documentation does not on the face of it make commercial sense for Glamour Green. Even though Glamour Green would have about 1,500,000 shares remaining after the sale of 35,000,000 shares to KL-Kepong or Ablington, the additional loss incurred far outweighed the value of the remaining shares.

[61] The memorandum to the Executive Committee of AmBank stated that the purchase price for LPF shares at RM3.80 per share was arrived at on a "willing buyer willing seller" basis, at a premium of RM0.90 or 31% over the closing market price of LPF shares of RM3.12 as at 6 August 2004, being the date of the sale and purchase agreements. The memorandum also reported that the LPF shares has been trading at RM1.86 to RM3.32 in the last 12 months. It noted that the counter was closed at RM2.90 on 26 November 2004.

[62] Assuming that RM3.80 is a reasonable price for a controlling block, the short term loan sought from AmBank of RM99,500,000 is about 72% of the purchase price of the shares at RM3.80 per share. But if a value of RM2.85 per share is assumed, the short term loan of RM99,500,000 is about 100% of the security. Since a security envisages forced sale conditions, no loan is extended at 100% of the purchase or market price of the property subsequently pledged as security, particularly where the security is shares where the value fluctuates more than land.

[63] Any "premium" for a controlling block is purely speculative, as it depends on how badly a party seeks to have a controlling block. It is difficult to place a value upon it and it is essentially, with limited information, too speculative. There is no evidence before the court as to what is the premium in the

market for a controlling block of shares of LPF. There is also no evidence KL-Kepong was interested to purchase at RM3.80 per share. The evidence before the court is only that KL-Kepong was prepared to buy the 35,000,000 shares at RM2.85 per share and that the most recent market price of the LPF shares prior to the loan is about RM2.90 per share.

[64] There is no evidence that the short term facility granted by AmBank upon the application of Glamour Green was other than a normal part of its business as a bank, where if exposure to risk could be contained, it stood only to earn substantial fees and interest.

The Nature Of The Purchase Undertaking

[65] At this point, it is appropriate to focus with more emphasis on the issue of the nature of the purchase undertaking and its role in the transaction.

[66] Bearing in mind that the last sale price of LPF shares on 26 November 2004 was at RM2.90 per share, the disposal then of the LPF shares at RM2.85 is at about the market price of LPF shares. The sale of 35,000,000 LPF shares at that price would produce RM99,750,000, which would ensure that AmBank would recover the principal sum it advanced. For practical purposes, therefore, by extending the short term facility of RM99,500,000 AmBank was in fact looking at a 100% financing of the shares if only the market value range of the LPF shares is considered. That, it must be accepted, could not justify the grant of the loan facility of RM99,500,000.

[67] Noting that AmBank stood to earn no more than the fees and interests it would earn in the ordinary course of business, and brokerage fees for AmSecurities, it cannot in the circumstances be said that AmBank was doing more than seek to contain that high risk margin by first ensuring that KL-Kepong signed the KL-Kepong Letter on 30 November 2004 before proceeding with the transaction.

[68] A pledge alone of the LPF shares obviously could never have been sufficient security. Daniel Wong (PW2) was obviously aware of the high margin exposure sought from the bank, and it is not disputed it was he who had proposed a purchase undertaking to AmBank in addition to pledge of the

LPF shares. The RM2.85 per share pricing was itself originally proposed to AmBank by Daniel Wong (PW2) in his memorandum (see para 5 above). That does not support the suggestion it is a scheme cooked up between AmBank and KL-Kepong and or Ablington, particularly when it is observed that Glamour Green makes no complaint against Daniel Wong (PW2).

[69] To summarise, bearing in mind the market price of LPF shares over the previous 12 months, the bare fact is that the short term loan amounted to about 100% of the market price. There was practically no margin left on the market price of traded LPF shares. The claimed "premium" over the market price of the shares for a controlling block is too speculative as a basis for security. A 100% loan can be supported if secured by a firm purchase undertaking by a purchaser ready willing and able to purchase and pay for the shares. Obviously, authorisation to proceed to finalise the sale to such a party would further enhance the security by such a party before the market price of the shares and status of such party changed. AmBank obviously chose this course in the draft loan agreement e-mailed to K. Ravindran (PW3) on 30 November 2004 and the copy put for execution the next day. A bank has no duty to be concerned whether its customer made a profit or not on a loan extended by it. Except to satisfy itself that its customer is able to repay the loan facility extended by it, a bank is not the judge of the wisdom, prudence or foolishness of its customer's transaction. AmBank's concern with its own protection is not unjustifiable. If the resulting terms were not acceptable to Glamour Green it was open to Glamour Green on 1 December 2004 not to have executed the loan agreement. I find also that AmBank had proceeded further and notified Glamour Green that the sale transaction to KL-Kepong would be effected within 30 days from 30 November 2004.

Clog On Equity Of Redemption

[70] There is nothing in the loan agreement that prevented Glamour Green from redeeming the shares that had been pledged to AmBank as security as would constitute a clog on the equity of redemption. Under the terms of the loan agreement between AmBank as lender and Glamour Green as borrower, Glamour Green could redeem the pledged shares at any time before the purchase undertaking under the KL-Kepong

Letter became effective and unconditional. The direction to AmBank and authorisation to it to proceed with sale of the LPF shares under cl. 11.1 being independent of the events of default in the loan agreement, it is a separate appointment. I find there is no doubt that cl. 11.1 appointed the lender AmBank to a separate and distinct role as agent of Glamour Green to effect or carry out the sale to KL-Kepong or Ablington under the terms of the KL-Kepong Letter. In carrying out the sale to KL-Kepong, AmBank was acting from the capacity of Glamour Green as owner of the shares, and not in its own capacity as lender. Such act cannot be termed as a clog on the equity of redemption, but is in fact the act of Glamour Green towards redemption. It did not prevent redemption as such by a lender but is the act of the borrower.

[71] Pursuant to the request and authorisation under cl. 11.1 of the loan agreement, AmBank called upon the purchase undertaking by KL-Kepong on 8 December 2004. By the time notice was given by Glamour Green on 14 December 2004, the sale had been committed to KL-Kepong, and AmBank on behalf of Glamour Green was obliged to deliver the shares upon payment. I conclude that since the sale by AmBank is pursuant to the authorisation and request of Glamour Green, AmBank's actions with regard to the sale under the terms of the KL-Kepong Letter are the acts of Glamour Green and, therefore, the issue of a clog on the equity of redemption does not arise.

The Sale To KL-Kepong And Ablington

[72] The letter of offer from AmBank to Glamour Green dated 30 November 2004 required from Glamour Green:

> An irrevocable and unconditional undertaking issued by a buyer acceptable to AmBank in form and substance acceptable to AmBank addressed to AmBank to purchase the pledged shares at RM2.85 per share.

[73] The purchase undertaking in the form and substance acceptable to AmBank took the form of the purchase undertaking contained in the KL-Kepong Letter dated 30 November 2004, addressed to AmBank (D1) with the heading "Re: Purchase Undertaking" begins as follows:

1. We, Kuala Lumpur Kepong Berhad, (Company No. 15043-V) do hereby unconditionally and irrevocably agree and confirm to purchase from you 35,000,000 ordinary shares (collectively "the Sale Shares") of Ringgit Malaysia One (RM1.00) only each in LADANG PERBADANAN-FIMA BERHAD (Company No. 52682-H) whose shares are listed and quoted on the Main Board of the Bursa Malaysia Securities Berhad ("BMSB") subject however that we may request for the Sale Shares to be transferred into the name of our nominee, Ablington Holdings Sdn. Bhd (Company No. 340277-P).

3. In consideration of the mutual covenants herein contained and the payment of the commitment fee of RM10.00 only by us to you, we hereby irrevocably and unconditionally agree to purchase from you all (but not some part of) the Sale Shares at the purchase price of Ringgit Malaysia Two And Sen Eighty Five (RM2.85) only per Sale Share ("the Purchase Price")

4. We hereby agree to effect settlement of the total Purchase Price of RM99,750,000 to you or as you shall direct within thirty (30) days from the date hereof ("the Completion Period" and the date of payment of the total Purchase Price shall be referred to as "the Completion Date"). We irrevocably and unconditionally authorize AmSecurities Sdn Bhd or such other stockbrokers (acceptable to you) to deal with you directly to effect the transfer of the Sale Shares by way of Direct Business Transaction in accordance with the rules and regulation of Bursa Malaysia Securities Berhad ("BMSB") ("the Direct Business Transaction") within the Completion Period. For such purposes, we will open a central depository account with such broker acceptable to you and execute all relevant documents and undertakings as may be required by such broker to effect and complete the transfer of the Sale Shares pursuant to the Direct Business Transaction.

Subject to full settlement of the total Purchase Price as aforesaid, and, subject to us obtaining the necessary approvals from BMSB and the regulations on delivery/crossing of securities of the BMSB, you shall effect the transfer of the Sale Shares no later than Three (3) market days thereafter into our securities account or our nominee's securities account.

5. We hereby confirm and undertake that we have and continue to have sufficient funds ("the Funds") to fully settle the total Purchase Price together with all brokerage, contract stamp, clearing fees arid related expenses or any other charges in connection thereto ("the Related Expenses").

[74] Pursuant to the undertaking contained in the KL-Kepong Letter, KL-Kepong was notified by AmBank on 8 December 2004 AmBank (D1) as follows:

> *Re: KLK Purchase Undertaking dated 30 November 2004 ("KLK Purchase Undertaking") issued by Kuala Lumpur Kepong Berhad to AmBank Berhad over 35.0 Million ordinary shares ("Sale Shares") of RM1.00 each in Ladang Perbadanan-Fima Berhad at RM2.85 per share*
>
> We refer to the above and confirm that the Sale Shares have been credited in our nominee's securities account and that the KLK Purchase Undertaking in relation to the Sale Shares is now unconditional and effective.
>
> Please acknowledge receipt of the above.
>
> Yours faithfully,
>
> For AmBank Berhad

[75] The following para. 2 of the KL-Kepong Letter is of relevance:

> 2. We confirm and agree that this letter ("this Undertaking") sets out the terms of our unconditional and irrevocable agreement to purchase from you or, you acting as attorney and/or agents for sale of the Sale Shares to us. Agree and acknowledge that your agreement to sell the Sale Shares to us pursuant to this Undertaking is subject however to the transfer and registration of the Sale Shares into your/your nominee's securities account on or before 6 December 2004. In the event the Sale Shares are not transferred and credited into your/your nominee's securities account on or before 6 December 2004 for any reason, you shall be entitled to terminate and revoke the sale of the Sale Shares by notice in writing to us. We confirm that you shall not be liable to us for any losses, damages, costs and/or expenses as a consequence of such termination.

[76] According to para 2 above, by 8 December 2004, AmBank was no longer obliged to proceed with a sale of the shares to KL-Kepong. So far as KL-Kepong was concerned, AmBank was under no obligation to do so. Nevertheless if AmBank elected to proceed with the sale, KL-Kepong was obliged to honour its undertaking.

[77] However, AmBank, acting as agent of Glamour Green in accordance with and under cl. 11.1 of the loan agreement with Glamour Green, required KL-Kepong to honour its purchase undertaking by declaring it unconditional and effective.

[78] Upon notification by the AmBank letter of 8 December 2004 that the KL-Kepong undertaking was unconditional and effective, the sale of the LPF Sale Shares to KL-Kepong was effected. KL-Kepong had to proceed with payment of RM99,750,000. This payment was made by Ablington and was received by AmBank on 14 December 2004. With that payment the purchase of the sale shares was complete. It is to be noted also that pursuant to the terms of the loan agreement, the tenure of the loan facility to Glamour Green ended with the receipt by AmBank of the LPF Sale Shares Consideration of RM99,750,000 on 14 December 2004.

[79] Dato' Lee Oi Hian (DW5) of KL-Kepong gave evidence and was cross-examined. So did Dato' James Lim Cheng Poh of AmBank. Both answered questions put to them clearly and in matter of fact manner. Nothing was brought out as would give any suggestion they were working together in an underhanded manner as the injunction application and the pleadings had suggested and alerted the court to. Both are clearly persons in positions where their reputations are of much more value than whatever disreputable profit that might be derived from this one transaction. I find that the allegation originally in the pleadings to be improbable.

[80] Counsel for Glamour Green sought to attack the KL-Kepong Letter by submitting that it departed from the definition in the loan agreement consistent with a unilateral undertaking, in that it purports to confirm an oral agreement on the bank to sell shares, thus moving it in the direction of a bilateral agreement.

[81] Reading the KL-Kepong Letter as a whole, it is clear it is not an agreement, since it is not executed by both parties. That AmBank "agreed" to sell does not necessarily mean agree in the contractual sense of a legally binding contract. If AmBank accepted the KL-Kepong Letter and acted upon it, AmBank is estopped from denying it had "agreed" to sell, as much as KL-Kepong is estopped from refusing to honour its promise in the letter to purchase the LPF Shares at RM2.85

per share since it clearly knew that AmBank would rely upon it in order to give a loan facility to Glamour Green. Reading the KL-Kepong Letter as a whole, and in the light of all the evidence, the court is satisfied that the parties intended the KL-Kepong Letter to be, and accepted and acted upon the same as a purchase undertaking, by Glamour Green for the purpose of obtaining the loan, AmBank for the purpose of securing repayment, and by KL-Kepong and Ablington who honoured it as a purchase undertaking.

Estoppel

[82] The KL-Kepong Letter was at all times, purely and simply, an undertaking to purchase 35,000,000 LPF shares at RM2.85 per share when called upon to do so, and to effect payment in full within 30 days from 30 November 2004. There is no condition that the undertaking may only be called upon in the event of a default of any loan nor was KL-Kepong a party to the terms and conditions in the loan agreement and documentation between AmBank and Glamour Green.

[83] Furthermore, it is not disputed Daniel Wong (PW2) had approached Dato' Lee Oi Hian (DW5) of KL-Kepong to provide assistance. The assistance was offered in the form of a purchase undertaking. No purchase undertaking is of any worth unless there is a party willing to accept it. I find that nothing sinister can be inferred simply by the fact he introduced Daniel Wong (PW2) to the Managing Director of AmBank, Dato' James Lim Cheng Poh (DW1). The evidence before the court shows that thereafter the terms and conditions of the loan agreement and other loan documentation were finalised between Glamour Green and AmBank, and except for the purchase undertaking which it signed, there is no evidence of other involvement by Lee Oi Hian (DW5) of KL-Kepong. On the evidence before the court, KL-Kepong was drawn back when its purchase undertaking was called upon, which it duly honoured. There is no justification to estop KL-Kepong and Ablington from receiving the shares that had been paid for wholly pursuant to the purchase undertaking, and for that reason AmBank cannot be estopped from delivering the shares to KL-Kepong and Ablington.

[84] For the reasons dealt with above, I find that no estoppel can arise.

Fundamental Mistake

[85] Since the consequences of signing the loan agreement resulted in a loss to Glamour Green, obviously, in ordinary parlance, the transaction was a mistake.

[86] Whether the mistake is mutual or unilateral are not necessarily germane. The law reports are replete with both kinds of mistake, and in both kinds of mistakes there has been cases where the courts have refused and have stepped in. In all these cases, the courts have sought to arrive at a fair and just resolution on the facts of the case, bearing in mind always that the courts' jurisdiction to rectify mistake must be kept within strict bounds to avoid unwarranted interference in commercial bargains. The basic rule to warrant interference is that the conduct of the party is unconscionable.

[87] Counsel relied upon s. 21 of the Contracts Act 1950. That section applies to mutual mistake: see *Law of Contract 2003 Dato' Seri Visu Sinnadurai* and *Sheikh Brothers Ltd v. Ochsner* [1957] AC 136 PC on s. 20 of the Indian Contracts Act. The mistake, if at all in this case, is on the part of Glamour Green only. Section 23 of the Contracts Act 1950 limited the basis to avoid the consequences of an agreement a party has entered into:

> **23. Contract caused by mistake of one party as to matter of fact.**
>
> A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

[88] Section 23 would clearly disallow avoiding the agreement since the mistake is unilateral. Even if common law is applicable, there is no evidence put before the court that AmBank was aware that Glamour Green was mistaken. AmBank had sent the drafts to K. Ravindran (PW3) who appeared with Daniel Wong (PW2) on the arrangements. The resolutions of the board of directors and of the members of Glamour Green, and acknowledgment by Glamour Green of the receipt of notification by AmBank of the purchase undertaking enclosing a

A copy of the purchase undertaking by KL-Kepong, as well as the loan agreements, guarantee, power of attorney and memorandum of deposit and charge over securities were signed the same day by all the relevant parties. If there were a rush in execution, it was more on the part of Glamour Green to B whom the completion date of its purchase of shares, originally 3 December 2004 but later extended to 6 December 2004, was fast approaching. There is no reason to believe that AmBank would act differently from Alliance Bank Berhad from whom Glamour Green was for some time seeking approval for C financing for the purchase of the same shares. I find it was the slowness of Alliance Bank that drove Glamour Green to seek assistance from KL-Kepong and short term financing from AmBank. The condition of a purchase undertaking acceptable to AmBank was offered by Daniel Wong (PW2), and the terms D were incorporated into the loan agreement. Given that the loan of RM99,500,000 was about 100% of the price of the shares in the stock market, the term in cl. 11.1 and sale of the shares within 30 days from 30 November 2004 is not an inexplicable requirement from AmBank to protect itself. Hard as it may be E to Glamour Green, AmBank acted consistent with that objective to protect itself by calling upon the purchase guarantee as soon as it had paid out the loan sum and received the shares.

[89] There is no reason to believe that Glamour Green, a F company able to meet its part of the purchase price of the LPF shares, of about RM40,000,000 would not know what it was doing. It is clear that the operative cause sprang not from a mistake but solely from the failure to read the agreement before executing the same. At the very least, Glamour Green could G have sought clarification of the short letter on one page informing Glamour Green that the acquisition by KL-Kepong was to be completed within 30 days from 30 November 2004. There is no dispute it was acknowledged on 1 December 2004 even though dated 30 November 2004, well before the H disbursement of the loan sum on 8 December 2004. If clarification was sought, then even if a mistake had occurred by the signing of the loan agreement, damage could still have been prevented. Again it was acknowledged without query. The reasonable degree of certainty to contracts sought to be I provided by contract law would be defeated if a party can escape from being bound by the terms of a written contract he

has signed without questioning by asserting he did not read it. I adopt the language of Abdul Malek Ishak J in *Wan Salimah bt Wan Jaffar v. Mahmood bt Omar (Amin binte Abdul Aziz, Intervener* [1998] 1 CLJ 480:

> It is trite law that when a party signs a contract knowing it to be a contract which governs the relations between them, like the present case, then, to use the words of Denning J (as he then was) in *Curtis v. Chemical Cleaning & Dyeing Co Ltd* [1951] 1 All ER 631, 'his signature is irrefragable evidence of his assent to the whole contract, including the exempting clauses, unless the signature is shown to be obtained by fraud or misrepresentation'. Way back in 1934, Scrutton LJ said in *L'Estrange v. F Graucob Ltd* [1934] 2 KB 394 that 'when a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not.

[90] I find also that Encik Affendi bin Tun Mohd Fuad Stephens (PW1) to be an intelligent and level-headed individual who would likely not have accepted the terms of the facility if the terms had been explained to him or if he had read the documents. But it is not the duty of AmBank to explain the terms of the loan agreement and documentation. He along with the other directors of Glamour Green left the negotiation entirely in the hands of Daniel Wong (PW2) and K. Ravindran (PW3).

[91] No satisfactory explanation has been given to explain why Daniel Wong (PW2) stated in the proposal to AmBank that the deficit of about RM99,500,000 was to be met by way of Glamour Green placing 35 million LPF shares to a third party at RM2.85 a share, thereby raising RM99,750,000 to fully settle the contracts. That language set the representation that the third party is the "take out" source of the loan, and it is apparent AmBank proceeded to consider granting the short term loan on the basis there is an acceptable third party take out source. Similarly Daniel Wong (PW2) had admitted that even under the Alliance Bank Berhad loan being sought, the bank may dispose of the LPF shares under a call option at RM2.85 per share without there being a default.

[92] Encik Affendi bin Tun Mohd Fuad Stephens (PW1) and the directors of Glamour Green have relied upon and have not found fault with Daniel Wong (PW2) or K. Ravindran (PW3). That leads me to the conclusion they accepted what these two persons have done for their company.

[93] Thus, even if the common law is applicable notwithstanding s. 23 of the Contracts Act 1950, the circumstances cannot justify the court to interfere with the terms of the loan agreement that Glamour Green had signed on the grounds of mistake.

Breach Of Fiduciary Duty By AmBank

[94] The fiduciary duties if any of a bank is limited to the nature of the relationship or transaction between the bank and its customer. There is, however, no general fiduciary duties such as that of a trustee or of a director of a company as between a bank and its customer. The relationship is contractual. There is no evidence AmBank took instructions from KL-Kepong or Ablington to act to the detriment of Glamour Green. There is no obligation in the appointment of AmBank as agent to obtain prior instruction or confirmation from Glamour Green before proceeding with the sale. It had clear direction to proceed, and would have become potentially exposed to liability to Glamour Green if it delayed and market price of shares fell or KL-Kepong became unable to honour its purchase undertaking, and the sale could not be effected without loss as a result.

Conclusions

[95] The KL-Kepong Letter of 30 November 2004 made it possible for the loan facility sought by Glamour Green to proceed. AmBank gave notice to Glamour Green dated 30 November 2004 that the sale to KL-Kepong or Ablington at RM2.85 per share would be completed within 30 days from 30 November 2004. This was acknowledged by Glamour Green. Glamour Green proceeded to execute the loan agreement and other documentation in relation to the RM99,500,000 loan facility. In cl. 11.1 of the loan agreement, Glamour Green requested and authorised AmBank to proceed with the sale to KL-Kepong. Upon drawdown of the RM99,500,000 AmBank proceeded in accordance with cl. 11.1 and declared the purchase undertaking unconditional and effective.

[96] Since AmBank is clearly and validly appointed as agent under cl. 11.1, and as such agent to carry out the sale, and that appointment and direction is in addition to its rights as lender in the event of an event of default, AmBank did not err in proceeding to confirm and make unconditional the undertaking to purchase by KL-Kepong. There being no pre-condition to the exercise of the direction to AmBank and its authorisation that it must first inform Glamour Green, its failure to inform Glamour Green was only a failure to exercise an abundance of caution as suggested by Loo May Pearl (PW4) but does not vitiate its action. Upon being notified its undertaking had become unconditional and effective, KL-Kepong obliged to honour its undertaking. It had done so by causing Ablington to make full payment on 14 December 2004. On that date, the purchase transaction by Ablington became complete and KL-Kepong and Ablington are entitled to the LPF Sale Shares and to exercise its rights therefor. The tenure of the short term facility ended.

Decision & Orders

[97] In the circumstances the court ordered:

(a) The plaintiff's claim is dismissed with costs;

(b) Per the plaintiff's undertaking, the plaintiff to pay to AmBank:

  (i) Damages to be assessed; and

  (ii) Costs

(c) In respect of counter-claim by KL-Kepong and Ablington:

  (i) Prayers a, b, c, d, e, f are granted.

  (ii) Prayer g: special and general damages to be assessed; and

  (iii) Costs.

(d) Interest applicable at statutory rate from date of writ.